IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 376.

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
Appellant,

versus

STATE OF ALABAMA,
Appellee.

BRIEF ON BEHALF OF APPELLANT.

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St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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I.

OPINION BELOW.

The opinion of the Supreme Court of Alabama in this case has not yet been reported officially. Unofficially it is reported in 210 So. 2d 696, and a copy is found in the Appendix, p. 37.

II.

JURISDICTION.

The State of Alabama imposed a flat privilege license on Appellant, herein referred to as "taxpayer", as a "transient or traveling photographer", for its activities in Ala-

bama, which taxpayer insisted, and still insists, were in interstate commerce, and therefore, the license constituted a burden thereon prohibited by the Federal Constitution.

The statutory provision believed to confer on this Court jurisdiction of this appeal is 28 U. S. C., Sec. 1257 (2).

The Supreme Court of Alabama affirmed the imposition of this privilege license on taxpayer on May 13, 1968. Notice of Appeal to this Court was filed on July 8, 1968. The appeal was docketed on August 5, 1968. Probable jurisdiction was noted on October 14, 1968.

III.

STATUTE INVOLVED.

The privilege license applied to taxpayer's activities was provided in, and, therefore, the statute whose validity is involved, is:

Title 51, Code of Alabama, § 569,

"§ 569. **Photographers and photograph galleries.** Every photograph gallery, or person engaged in photography, when the business is conducted at a fixed location: In cities and towns of seventy-five thousand inhabitants and over, twenty-five dollars; in cities and towns of less than seventy-five thousand and not less than forty thousand inhabitants, fifteen dollars; in cities and towns of less than forty thousand and not less than seven thousand inhabitants, ten dollars; in cities and towns of less than seven thousand and over one thousand inhabitants, five dollars; in all other places whether incorporated or not, three dollars. The payment of the license required in this section shall authorize the doing of business only in the town, city or county where paid. For each transient or traveling photographer, five dollars per week."

The License Code of Alabama provides that the amounts set out therein are levied for the use and benefit of the State. It also provides in Title 51, Code of Alabama, § 831 (c):

> "(c) There is hereby levied for the use and benefit of and to be paid to the county in which the license is issued, in addition to all license taxes levied under the provisions of article 1 of chapter 20, for state purposes and which are payable to the judge of probate or commissioner of licenses, a sum equal to fifty percent of the amount levied for State purposes, except as otherwise specifically provided."

There were no other provisions applicable in this case, therefore the license here was computed for each county where taxpayer operated:

For the State	$5.00 per week
For the county	2.50 per week
	$7.50 per week

The annual state photographer's license on those engaged in business "at a fixed location" in the cities where taxpayer operated is:

Andalusia	$10.00
Anniston	10.00
Birmingham	25.00
Decatur	10.00
Dothan	10.00
Jasper	10.00
Prichard	15.00
Mobile	25.00

The assessments in this case were for

One half year—April, 1963-September, 1963;
One year—October, 1963-September, 1964;
One year—October, 1964-September, 1965.

Had taxpayer obtained a state photographer's license for engaging in business "at a fixed location" for these periods in Birmingham, it would have been:

One-half year	$12.50
One year	25.00
One year	25.00
	$62.50

Since taxpayer had been in Birmingham during 22 weeks in this period, the actual license assessed against taxpayer for benefit of the State for operating in Birmingham for this period was $110.00, about twice what it would have been had taxpayer been licensed to operate "at a fixed location."

The nature of the license granted is provided in Title 51, Code of Alabama, § 840, which provides:

> "§ 840. **License deemed a personal privilege.**—(a) Every license shall be held to confer a personal privilege to transact the business, employment or profession which may be the subject of the license, and shall not be exercised except by the person, firm or corporation licensed, unless specifically authorized by law to do so. (b) A business or privilege for which such license is issued is, under actual sale, transferred to a new ownership in which case a transfer of license may be effected by application to the probate judge originally issuing such license and the payment of a fee of fifty cents."

With these provisions, attention is drawn to part of the first sentence, in Title 51, Code of Alabama, § 831, which provides:

> "§ 831. **License, procurement of; form of license.**—Before any person, firm, or corporation shall engage in or carry on any business or do any act for which

a license by law is required, he, they, or it, except as otherwise provided, shall pay to the judge of probate of the county in which it is proposed to engage in or carry on such business or do such act, or to the commissioner of licenses or the state department of revenue, as specifically the amount required for such license, and shall comply with all the other requirements of this title; * * *."

IV.

QUESTIONS PRESENTED.

Taxpayer is engaged in the business of soliciting orders for and taking baby pictures throughout the country, out of Charlotte, North Carolina, operating in and using the facilities of a nation-wide chain of department stores (J. C. Penney Company). The City of Mobile, Alabama, sought to impose a discriminatory privilege license tax on these activities (as more fully appears in the related case, **Dunbar-Stanley Studios, Inc. v. City of Mobile**, which is appealed with this case) and then the State of Alabama sought to impose the license tax quoted above on these same activities. The questions presented in this case are:

(1) whether or not the unbroken chain of interstate activities here involved may be fractionalized into parts on which state licenses may be imposed;

(2) whether or not these activities in interstate commerce are subject to this flat, fixed sum, unapportioned privilege license tax as a condition precedent to the performance of this interstate activity in the State of Alabama; and

(3) whether or not the applicability of a weekly rather than an annual license, increasing the amount exacted, can be made dependent upon interstate activity?

V.

STATEMENT OF THE CASE.

Taxpayer had operated openly at the J. C. Penney Company stores located in eight cities in Alabama, since 1963 with no hindrance or notice from the State of Alabama, and without being assessed any privilege license by the State Department of Revenue or anyone else under the statutes noted in III above (A. 4, 7). On August 31, 1965, the City of Mobile amended its photographer's license schedule to impose a license on taxpayer of $50.00 per day. To prevent the imposition of this license, taxpayer commenced a declaratory judgment proceeding in the State Court to test the validity of this license, all as appears more fully in the related case of **Dunbar-Stanley Studios, Inc. v. City of Mobile**, No. 377, pending in this court.

Thereafter, on May 19, 1966, the State Department of Revenue assessed the privilege license quoted in III above, against taxpayer for the operations in Mobile and seven other cities in Alabama not only for the license for that year, but for licenses for prior years to 1963 (A. 2, 3, 6). From this assessment, an appeal to the circuit court of Montgomery County, Alabama was taken (A. 6, 7).

From the pleadings and oral testimony taken in open court it was developed that taxpayer was engaged in the photography business in Charlotte, North Carolina, specializing in photography of chiildren (A. 3, 7). It had no office, inventory, developing laboratory or agent in Alabama (A. 3, 16). J. C. Penney Company was a department store which entered into an agreement for taxpayer to engage in taxpayer's photography work in the Penney stores, some of which were in Alabama (A. 4, 17, 18). The dates of visits by taxpayer's photographers were fixed by the local Penney store managers (A. 5, 22). Newspaper ad-

vertisements were run by Penney (A. 4, 18), but its cost was deducted from the gross receipts (A. 21). Taxpayer prepared postal cards notifying its customers of the visits, which were mailed out by Penney (A. 29).

Taxpayer's photographers then came into Alabama, solicited orders for pictures, took pictures, returned the exposed film to Charlotte, with the customer's orders for pictures, and if the orders were accepted, the pictures were developed, printed and finished (A. 4, 5, 9, 18, 19). The finished pictures were returned to the Penney stores where they had been taken, and they were paid for and picked up by the customer (A. 5, 18, 19). The payments were made to the Penney employees only, and not to taxpayer's photographers or agents (A. 5, 18, 19).

Penney retained a percentage of the receipts as its commission, and after deducting expenses, remitted the balance to taxpayer (A. 21). Penney did no photography work in Alabama (A. 5, 24). This was done by taxpayer on Penney's premises, though subject to Penney's store rules as to hours, time, place, etc., of taking the pictures (A. 5, 23, 24).

VI.

SUMMARY OF ARGUMENT.

I.

State Fractionalizing of Interstate Commerce and Licensing Essential Elements Is Prohibited by the Commerce Clause in the Federal Constitution.

1. State Fractionalizing.

In **Graves v. State**, 258 Ala. 359, 62 So. 2d 446 (1953), the Supreme Court of Alabama applied the state photographer's license to one engaged only in exposing film. In **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961), the Court affirmed this even though there were solicitors as well as proof-displayers in the case.

In the case at bar though taxpayer's representative performed all of the functions of the photographer within the State, the Court separated out of the single transaction the exposure of film, and applied the license to that.

Since interstate commerce must be performed within the states, if the states may carve it up into "local incidents" and license each such incident separately, state lines would become impediments to intercourse between the states.

Memphis Steam Laundry v. Stone, 342 U. S. 389, 395 (1952).

In the drummer license cases, this Court held that the states cannot separate out solicitation of interstate sales for licensing,

Nippert v. Richmond, 327 U. S. 416, 423 (1946),

nor may delivering picture frames be separated out of the business of photography for licensing,

Caldwell v. North Carolina, 187 U. S. 622 (1903),

nor selling picture frames,

Dozier v. Alabama, 218 U. S. 124 (1910),

nor can "taking" gas be split off from taking and transporting gas in interstate commerce.

Michigan-Wisconsin Pipe Line v. Calvert, 347 U. S. 157, 169 (1954),

nor can soliciting and delivering be set apart out of interstate wholesale grocery business and licensed.

West Point Grocery Co. v. Opelika, 354 U. S. 390 (1957).

2. Licensing Essential Elements.

An integral part of the interstate process which cannot realistically be separated from it, cannot be separately licensed by the states under the Commerce Clause.

Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 422, 429, 433 (1947);

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 166 (1954).

Exposing film is an essential element in photography. Therefore, licensing exposing film is licensing the photography business.

Photography across a state line is an interstate transaction. But interstate transactions cannot be licensed.

Memphis Steam Laundry v. Stone, 342 U. S. 389, 393 (1952);

Crutcher v. Kentucky, 141 U. S. 47, 58 (1891);

Spector Motor Service v. O'Connor, 340 U. S. 602, 608, 609 (1951).

3. Distinguish Multiple Businesses From Single Activity.

Regardless of whether or not multiple businesses may be separately licensed, **Spector Motor Service v. O'Connor**,

340 U. S. 602, 609 (1951), there is no authority we have found outside this case splitting up into parts a single business activity. But even when the multiple businesses are sought to be separately licensed, the licenses must be

1. Solely on intrastate business,
2. Not increased for interstate business,
3. Not on one solely in interstate business,
4. So that taxpayer can discontinue intrastate business without withdrawing from interstate business.

Sprout v. South Bend, 277 U. S. 163, 171 (1928).

The license in this case flunks these tests.

II.

Flat-Sum Privilege Tax on an Essential Element of an Interstate Activity Is Prohibited by the Commerce Clause in the Federal Constitution.

1. Flat-Sum Privilege Taxes Are Exclusory.

West Point Grocery Co. v. Opelika, 354 U. S. 390 (1957).

2. Exclusory Licenses on Interstate Activity Are Void Under the Commerce Clause.

Nippert v. Richmond, *supra*;
Best & Co. v. Maxwell, 311 U. S. 454 (1940).

III.

Licenses Used to Discriminate Against Interstate Commerce Are Invalid Under the Commerce Clause.

1. Legal Discrimination.

Photographers at a fixed location pay an annual license in Alabama. Taxpayer operates at a fixed location but sends the exposed film out of the state for processing.

For this the Supreme Court of Alabama holds that the weekly transient license applies.

> **Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So. 2d 388 (1961).**

This makes the license more expensive than it would be if the out-of-state activity were not engaged in. Such discrimination is fatal to a state license under the Commerce Clause.

> **Robbins v. Shelby County Taxing District, 120 U. S. 489 (1887);**
> **Best & Co. v. Maxwell, 311 U. S. 454 (1940);**
> **Nippert v. Richmond, 327 U. S. 416, 434 (1946).**

2. Factual Discrimination.

On August 31, 1965, the City of Mobile sought to impose a discriminatory license of $50.00 per day on taxpayer alone for each day's operation. This is incomprehensible unless it was brought about by taxpayer's local competitors. The city license was met by litigation. Thereafter, though the State had made no move to require a license from taxpayer for over three years, suddenly the assessments involved in this case were made by the State Department of Revenue on May 19, 1966. This is not explainable except as a further effort by competitors to exclude taxpayer from Alabama. The cases in this Court recognize this.

> **Robbins v. Shelby County Taxing District,** *supra*;
> **Nippert v. Richmond,** *supra*.

A fortiori, such discrimination against interstate trade cannot withstand attack under the Commerce Clause.

VII.

ARGUMENT.

State Fractionalising of Interstate Commerce and Licensing Essential Elements Is Prohibited by the Commerce Clause in the Federal Constitution.

1. State Fractionalising.

It will be recalled that in **Graves v. State**, 258 Ala. 359, 62 So. 2d 446 (1953), an employee of Olan Mills, Inc., a non-resident photographer, was prosecuted criminally for failing to have the license sought from taxpayer by the State in this case. Olan Mills had a two-stage operation at that time. It sent solicitors into the State to obtain orders for pictures. Thereafter, the photographer came into the State to fulfill those orders, by exposing film, and then sending the exposed film back to the home office outside Alabama where the film was developed, printed and finished, and the picture was sent directly to the customer. The first question was whether or not merely exposing film constituted the business of photography within the terms of the license. The Alabama Court held that it did. The next question was whether or not this license was imposed on interstate commerce. The Alabama Court held that it did not, distinguishing the drummer license cases in this Court because there the license was on soliciting orders for interstate sales. Graves did not solicit orders, and therefore, the license was not on soliciting, and hence the drummer cases did not apply here.

To clarify the matter, Olan Mills brought a declaratory judgment proceeding in **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961). It was shown here that Olan Mills actually had a three-stage photography business. The first group passing through the State was the solicitors who took orders and lined up appointments with cus-

tomers to have pictures taken. The second group came through merely fulfilling the commitments and exposing the film. The third group came back into the State with proofs from which the customers selected the pictures to be finished.

The Alabama Court held that this case was governed by the **Graves** case, and since the Alabama license applied to the exposing of film only, this did not run afoul of the drummer cases, and therefore, the tax did not violate the Commerce Clause.

We think the Alabama Court inadequately analyzed and considered the facts in these cases, and misapplied the applicable law to the facts.

Regardless of this, when the case at bar arose, the Alabama Court completely overlooked the fact that taxpayer's photography business is a single unitary transaction. Only one person comes into the State in this case, and this one person obtains the orders for pictures, exposes the film, transmits the exposed film to taxpayer's plant in North Carolina, and moves on. Certainly taxpayer has not fractionalized this interstate transaction into parts.

The Supreme Court of Alabama, however, held that:

(1) The State may fractionalize into parts photography business which runs across state lines,

(2) It may pick out for tax the exposure of film in Alabama, and

(3) This will not infringe on the Commerce Clause.

It was held that the **Graves** and **Haden** cases called for this conclusion.

For a non-resident photographer to divide its business in this State into parts, and have the State seize one of these parts and require a license for it is one situation.

For the State to carve up a single business transaction into parts, and seek to license one of these parts is an entirely different situation. The failure of the Supreme Court of Alabama to appreciate this distinction is unfortunate. In other words, we think this is bad Alabama law.

The question before this Court, however, is the right of the State to isolate into discrete parcels a single interstate activity, and impose a license on one of the essential elements of the transaction. The Alabama Supreme Court held it could. We insist that this is reversible error.

It has been argued in this Court that such fractionalizing of an interstate activity can be done and the parts licensed by a state. This Court answers it in **Nippert v. Richmond**, 327 U. S. 416, 423 (1946):

> "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular

phases or incidents, label them as 'separate and distinct' or 'local', and thus achieve its desired result. "It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax."

See also:

Freeman v. Hewit, 329 U. S. 249, 267 (1947) (concurring Opinion);

Memphis Steam Laundry v. Stone, 342 U. S. 389, 393 (1952);

Railway Express Agency v. Virginia, 347 U. S. 359, 367, 368 (1954).

Insofar as the states have isolated solicitation of orders from sales across state lines, and sought to license such solicitation, this Court has condemned such fractionalizing of interstate sales without exception. In addition to the cases above,

See also: **Robbins v. Shelby County Taxing District**, 120 U. S. 489 (1887). The cases are collected in **Memphis Steam Laundry v. Stone**, 342 U. S. 389, 393, f.n. 7. Also see Lockhart, **Sales Tax in Interstate Commerce**, 52 H. L. R. 617, 618, f.n. 10 (1939).

Efforts to split up sales of pictures across state lines and tax local parts of the transaction began some time ago. In **Caldwell v. North Carolina**, 187 U. S. 622 (1903), the State Court held that a broad license on photographers could be construed in that case to cover an agent who was "delivering picture frames" within the city. Since the delivery within the city was local, the State Court separated this from the photography business generally and held that this construction shielded the license from attack under the Commerce Clause. This Court held that

this effort to split up this transaction to tax the local part was unavailing under the Commerce Clause.

In **Dozier v. Alabama**, 218 U. S. 124 (1910), the drummer's license on photographers covered those selling picture frames as part of their business of photography. The Alabama Supreme Court construed the license to apply to the sale of picture frames within the State, a local activity, and therefore immune from attack under the Commerce Clause. Writing for the Court, Justice Holmes said:

> "We are of opinion that the sale of frames cannot be so separated from the rest of the dealing between the Chicago company and the Alabama purchaser as to sustain the license tax upon it."

Affirmed:

Davis v. Virginia, 236 U. S. 697 (1915).

In **Michigan-Wisconsin Pipe Line v. Calvert**, 347 U. S. 157 (1954), the State sought to license "gathering gas produced" in the State. The pipe line purchased gas and transported it in interstate commerce. The state court held that purchasing gas was included in "gathering" as used in the statute, and since the purchasing preceded the transportation and was local in its nature, the license did not offend the Commerce Clause. In reversing, this Court said at page 169:

> "* * * we think that, as a basis for finding a separate local activity, the incidence must be a more substantial economic factor than the movement of the gas from a local outlet of one owner into the connecting interstate pipeline of another. Such an aspect of interstate transportation cannot be 'carve[d] out from what is an entire or integral economic process', Nippert v. Richmond, supra (327 U. S. at 433), by legislative whimsy and segregated as a basis for the tax. The separation must be realistic."

Certainly carving out exposing film from the business of photography is unrealistic, and to permit such mutilation of an entire and integral economic process for purposes of taxation of interstate transactions would undermine the policy of preserving interstate commerce free and unrestricted by state lines.

In **West Point Grocery Co. v. Opelika**, 354 U. S. 390 (1957), the city by licensing ordinance sought to segregate soliciting orders for groceries and delivery within the city from the wholesale grocery business across state lines, and license the soliciting and delivering as local activities. This Court held that such breaking up of this "uninterrupted movement in interstate commerce" could not be done for the purpose of applying a flat-sum privilege license.

Since a state cannot split off sales of frames from sales of pictures across state lines and hang a license on the sale of frames, and it cannot split off solicitation of orders from sales of goods across state lines and hang a license on the solicitation, and it cannot split off purchase from purchase and transporting of gas in interstate commerce, so a state should not split off exposing film from the photography business and hang a license on it, as was done in this case. We can see no difference in principle between the cases for the reasons set out in **Nippert** above.

2. Licensing Essential Elements.

Taxpayer has a plant in Charlotte from which photographers are sent into Alabama, and other places, to take baby pictures. Film is exposed by the photographer in Alabama, and returned to Charlotte for developing, printing, processing, and re-delivery to Alabama. No one has, and in our judgment, no one can argue that Alabama can license taxpayer's activities in Charlotte. Nor can Alabama license the entire process, both that done in Alabama and North Carolina.

The question here is whether or not Alabama may take out of this series of events the single act of exposing film in Alabama, and license that alone.

In **Joseph v. Carter & Weekes Stevedoring Co.**, 330 U. S. 422 (1947) a privilege license measured by gross receipts was imposed on a stevedoring company engaged in loading and unloading ships engaged in interstate and foreign commerce. This Court observed on page 429:

> "The selection of an intrastate incident as the taxable event * * * where the taxable event is considered sufficiently disjointed from the commerce, * * * is thought to be a permissible State levy."

In deciding this case, this Court went on to say on page 433:

> "Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid."

The cases holding that closely related activities to interstate transportation may not be licensed by the states, such as loading or unloading, are collected in **Michigan-Wisconsin Pipe Line Co. v. Calvert**, 347 U. S. 157, 168 f. n. 5 (1954). The reason for these holdings was set out on page 166:

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate proces, the flow of commerce, that it cannot realistically be separated from it."

This is the basis for **Memphis Steam Laundry v. Stone**, 342 U. S. 389 (1952) where the question was whether or not the license was imposed on door-to-door solicitation of laundry. It was argued that since such solicitation had to be local, a license thereon could not affect interstate com-

merce even when the solicitor was from an out-of-state laundry. This Court answered that:

> "If the Mississippi tax is imposed upon the privilege of soliciting interstate business, the tax stands on no better footing than a tax upon the privilege of doing interstate business. A tax so imposed cannot stand under the Commerce Clause."

This has been the rule for many years.

In **Crutcher v. Kentucky**, 141 U. S. 47, 58 (1891), this Court said:

> "We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

The leading case on this today is **Spector Motor Service v. O'Connor**, 340 U. S. 602, 608, 609 (1951), where it was pointed out that even non-discriminatory licenses on interstate commerce are invalid.

Accord:

Barrett v. New York, 232 U. S. 14, 31 (1914);
Memphis Steam Laundry v. Stone, 342 U. S. 389, 392, 393 (1952).

See also:

Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, 162 (1903);
Alpha Portland Cement Co. v. Mass., 268 U. S. 203, 217 (1925);
Lily & Co. v. Sav-on-Drugs, 366 U. S. 276, 278, 279 (1961).

The basis of this, as stated in **Crutcher v. Kentucky**, 141 U. S. 47, 57 (1891), is that the privilege of engaging in

interstate commerce is given by the national government and not by the states, being "a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States * * *."

Since the photography business must have the exposing of photographic film, a license thereon is a license on the business. Since the photography business engaged in by taxpayer is across state lines, a tax on taxpayer's business must be a tax on interstate activity. This is precisely what the cases above hold is not up for licensing by the states.

The fact, if it were a fact, that the State imposed the same license on exposing film which was developed, printed and processed in Alabama, as that imposed on taxpayer (where the film is developed, printed and processed in North Carolina) will not save this license. These were the facts in **Robbins v. Shelby County Taxing District**, 120 U. S. 489, 497 (1887), and this Court said:

> "Interstate commerce cannot be taxed at all, even though the same amount of the tax should be laid on domestic commerce, or that which is carried on solely within the State."

This has been repeated time and again.

Nippert v. Richmond, 327 U. S. 416, 431 (1946);
Freeman v. Hewit, 329 U. S. 249, 252 (1947).

See also:

Caldwell v. North Carolina, 187 U. S. 622, 629 (1903);
Spector Motor Service v. O'Connor, *supra*.

3. Distinguish Multiple Businesses From Single Activity.

Attention has been directed to the fact that in this case and in **Haden v. Olan Mills, Inc.**, 273 Ala. 128, 135 So. 2d

338 (1961), the Alabama courts failed to appreciate that Olan Mills divided its interstate photography into three parts, which is not true of taxpayer's operations. The Alabama courts also failed to differentiate between a single, unitary interstate activity, such as taxpayer's activity, and multiple businesses carried on by one entity. Of course a taxpayer may engage in interstate commerce, and intrastate commerce and foreign commerce, all at the same time. Thus, in **Osborne v. Mobile**, 16 Wall. 479 (1873), the city imposed three licenses on express companies:

> For those doing only a city business, $50.00 per year;
> For those doing business only within the state, $100.00;
> For those doing business outside the state, $500.00.

This Court held that the $500.00 license was rightly applied to an express company doing business across the state line. It is true that this case was overruled in **Leloup v. Port of Mobile**, 127 U. S. 640, 648 (1888), where a flat license of $225 was imposed on telegraph companies when the taxpayer in this case was engaged in business across state lines. This Court observed:

> "* * * no State has the right to lay a tax on interstate commerce in any form, * * * or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

However, we may assume that the State may be able to tax one part of a multiple business. But it would not follow from this that Alabama may isolate one phase of a continuous transaction across a state line and license that phase.

This was spelled out in **Spector Motor Service v. O'Connor**, 340 U. S. 602, 609 (1951), where it was said:

"This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was **exclusively** interstate in character."

This was followed with:

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business * * *."

This right to tax intrastate business was set out in **Sprout v. South Bend**, 277 U. S. 163, 171 (1928), by Justice Brandeis:

"But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

This has been quoted approvingly many times.

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 470 (1931);

Cooney v. Mountain States Telephone, etc., Co., 294 U. S. 384, 393 (1935);

Pacific Telephone, etc., Co. v. Tax Commission, 297 U. S. 403, 414 (1936).

See also:

Portland Cement Co. v. Minn., 358 U. S. 450, 486 (1959), Dissenting Opinion.

The Supreme Court of Alabama held that the license here involved is on exposing film and this is local or intrastate activity. In order for the tax on it to pass this test, taxpayer should be able to discontinue exposing

film without withdrawing from the photography business across state lines. Since this is impossible, the tax imposed on taxpayer in this case cannot pass this test applicable to multiple businesses.

II.

Flat-Sum Privilege Tax on an Essential Element of an Interstate Activity Is Prohibited by the Commerce Clause in the Federal Constitution.

The rule in such cases was stated in **McGoldrick v. Berwind-White Coal Mining Co.**, 309 U. S. 33, 45, f. n. 2 (1940):

> "Fixed-sum license fees, regardless of the amount, for the privilege of carrying on the commerce, have been thought likely to be used to overburden the interstate commerce."

Hence, when a city imposed a flat-sum license fee on the solicitation of orders for sale of goods in interstate commerce, it was held that this license was prohibited by the Commerce Clause in **West Point Grocery Co. v. Opelika**, 354 U. S. 390, 391 (1957):

> "We held in Nippert v. Richmond, 327 U. S. 416, and in Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U. S. 389, that a municipality may not impose a flat-sum privilege tax on an interstate enterprise whose only contact with the municipality is the solicitation of orders and the subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce, such a tax having a substantial exclusory effect on interstate commerce."

1. Flat-Sum Privilege Taxes Are Exclusory.

In addition to the quotations above, this principle has been noted in two other cases in this Court, namely:

Best & Co. v. Maxwell, 311 U. S. 454, 455, f. n. 3 (1940);

Memphis Steam Laundry v. Stone, 342 U. S. 389, 393 f. n. 11 (1952).

But this does not require judicial sanction to make it valid. It is apparent.

To begin a business, various sums are required. Among them is rent, or its equivalent. But this will be graduated according to suitability, location, etc., and it will not all be paid in advance. Wages, with withholdings, social security, employment taxes, etc., are paid after the fact, and will be graduated on volume of business, etc. Ad valorem taxes are payable at the end of the year rather than at its beginning, ordinarily.

Privilege licenses imposed before business can begin will obviously have an exclusory effect. When the admission tax is a flat-sum, it can be prohibitive. For how can the entrepreneur invest substantial sums to commence a business which he has no assurance will survive? This is recognized and fully discussed in **Nippert v. Richmond**, 327 U. S. 416, 428-431.

See also:

Lockhart, **Sales Tax in Interstate Commerce**, 52 H. L. R. 617, 620, 621 (1939);

Lockhart, **State Tax Barriers to Interstate Trade**, 53 H. L. R. 1253, 1276 (1940);

Hartman, **State Taxation of Interstate Commerce**, 46 Va. L. R. 1051, 1095 (1960).

In VIII Law and Contemporary Problems, Spring, 1941, issue on Governmental Marketing Barriers, privilege licenses are described as constituting interstate trade barriers by Paul T. Truitt, in **Interstate Trade Barriers in the United States**, *Id.* 209, 210.

Hence, it is rather apparent now that flat-sum privilege licenses required before interstate activity can commence have the effect of excluding interstate activity.

2. Exclusory Licenses on Interstate Activity Are Void Under the Commerce Clause.

The policy of the Commerce Clause has been set forth in many cases. In **Robbins v. Shelby County Taxing District**, 120 U. S. 489, 494 (1887), it was said at page 494:

> "In a word, it may be said that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems."

In **Memphis Steam Laundry v. Stone**, 342 U. S. 389, 395 (1952), it was stated:

> "The Commerce Clause created the nation-wide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states."

See also:

Passenger Cases, 7 How. 282, 445 (1849);
Developments in the Law—Federal Limitations on State Taxation of Interstate Business, 75 H. L. R. 953, 956-960 (1962).

Therefore, it inevitably follows that if a state tax has an exclusory effect on interstate activity within that state, then this state line would become an impediment to intercourse between the states, and this would violate the basic concept of the Commerce Clause. This flat-sum admission license would require interstate commerce not merely to "pay its way", it would make interstate commerce pay tribute to get into a state. It does not require precedent to establish that this would completely thwart the idea behind the Commerce Clause, however, it was discussed fully in **Nippert v. Richmond**, 327 U. S. 416, 425, where it was said:

> "For, though 'interstate business must pay its way', a state consistently with the commerce clause cannot

> put a barrier around its borders to bar out trade from other states and thus bring to naught the great constitutional purpose of the fathers in giving to Congress the power 'To regulate Commerce with foreign Nations, and among the several States * * *.'"

In **Best & Co. v. Maxwell**, 311 U. S. 454, 455 (1940), this Court said:

> "The commerce clause forbids discrimination, whether forthright or ingenious."

See. also:

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 48 (1940).

Therefore, since a flat-sum admission license is exclusory, the imposition of such a license on interstate business activity is exclusory. State admission licenses excluding interstate businesses make state lines impediments to intercourse between the states. This cannot be done in view of the Commerce Clause.

III.

Licenses Used to Discriminate Against Interstate Commerce Are Invalid Under the Commerce Clause.

1. Legal Discrimination.

The annual state photographer's license on those engaged in business "at a fixed location" in the cities where taxpayer operates is set out above. Taxpayer does its photography business "at a fixed location" in every city where it operates, namely in the stores of J. C. Penney Company. In **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961), the out-of-state photographers had branch operations in Alabama where photographs were taken, but the exposed film was sent out of the State

and finished pictures were returned to the customers within the State. In passing on the appropriate photographer's license for these operations, the Supreme Court of Alabama said (273 Ala. 132):

> "True, in the branch operation there is a fixed location. But it sends its films back to Chattanooga to be processed and pictures are ultimately made in Chattanooga."

Based on this, it was held that the applicable license was that "required of transient or traveling photographers," or $5.00 per week, rather than $25.00 per year in Birmingham or Mobile for operating "at a fixed location." As noted above, the state photographer's license for operating in Birmingham "at a fixed location" for the period covered by the assessment here involved would have been $62.50. By reason of taxpayer's interstate activity in sending exposed films out of the State to be developed, printed and finished, the transient license at the rate of $5.00 per week for taxpayer's operations in Birmingham during this period was assessed in the amount of $110.00.

This can and will occur in operations by taxpayer in other cities. Hence, operations by taxpayer in Andalusia, Anniston, Decatur, Dothan and Jasper for three weeks, or parts thereof, will subject taxpayer to a higher license than would be due on taxpayer's competitors in these cities even though they both operated from a fixed location. The higher license is imposed on taxpayer because of his interstate activity, namely, sending exposed film outside the State to be processed.

This is, of course, akin to exclusory licenses on interstate activity. If a state may impose a license which will tend to exclude interstate activity, it may exclude the activity. There are no apparent degrees of exclusion available to states. They may exclude or they may not exclude such activity. To permit exclusion for a "small"

degree, or a "reasonable" amount, is incompatible with the Commerce Clause.

Discriminatory licenses based on interstate activity are in the same class. If states may discriminate against interstate activity, they can block it. There are no known or recognized degrees of discrimination against interstate activity.

In fact, the discriminatory nature of the drummers' license in **Robbins v. Shelby County Taxing District**, 120 U. S. 489, was one of the reasons it was stricken. This Court said, page 498:

> "It would not be difficult, however, to show that the tax authorized by the State of Tennessee in the present case is discriminative against the merchants and manufacturers of other States. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents; and if they had, they are not subject to any tax therefor."

In commenting on the **Robbins** case, in **Best & Co. v. Maxwell**, 311 U. S. 454, 455, f. n. 3 (1940), this Court said:

> "In McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, we pointed out that the line of decisions following Robbins v. Taxing Dist., 120 U. S. 489, read in their proper historical setting, rested on the actual and potential discrimination inherent in certain fixed-sum license taxes."

This was quoted approvingly in

Nippert v. Richmond, 327 U. S. 416, 421 f. n. 5, and 424.

See also:

Memphis Steam Laundry v. Stone, 342 U. S. 389, 394 (1952).

The latest and most comprehensive statement on this is found in **Portland Cement Co. v. Minnesota**, 358 U. S. 450, 458 (1959):

> "It has long been established doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the States. Gibbons v. Ogden, 9 Wheat. 1. In keeping therewith a State 'cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose' such as itinerant drummers. Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 493, 494. Moreover, it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce, Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602. Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U. S. 389; Nippert v. Richmond, 327 U. S. 416, or by subjecting interstate commerce to the burden of 'multiple taxation', Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157; J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307. Such impositions have been stricken because the States, under the Commerce Clause, are not allowed 'one single-tax worth of direct interference with the free flow of commerce.' Freeman v. Hewitt, 329 U. S. 249, 256."

See also:

Hartman, **State Taxation of Interstate Commerce**, 46 Va. L. R. 1051, 1114 (1960);

Developments in the Law—Federal Limitations on State Taxation of Interstate Business, 75 H. L. R. 953, 962, 963 (1962).

Since the Alabama Court held in this case that by reason of taxpayer sending exposed film outside the state for processing, the weekly transient rather than the annual license applied, this construction discriminates against interstate activity. Had taxpayer sent the exposed film elsewhere in Alabama rather than to North Carolina, this odd construction of this license would not have applied, and since taxpayer actually operated "at a fixed location" factually, this weekly charge discriminates against taxpayer, and because of interstate activity.

Discriminatory treatment of interstate activity violates the Commerce Clause, and therefore since the construction of this license discriminates against interstate activity, it cannot withstand attack under the Commerce Clause.

2. Factual Discrimination.

From the pleadings and proof in this case, it appears that taxpayer has operated openly in Alabama for several years without being called on for the license imposed in this case. As appears from **Dunbar-Stanley Studios v. City of Mobile**, No. 377, presently on appeal in this Court, the City of Mobile amended its license schedules on August 31, 1965, to impose a license of $50.00 per day on the operations of taxpayer in Mobile. It was alleged in that suit for declaratory judgment that this was amended for the express purpose of imposing this prohibitive license on taxpayer. It was after the declaratory judgment suit was commenced, and an agreement between taxpayer and the City Commissioners had been made permitting taxpayer to continue operations *pendente lite*, that the State Department of Revenue discovered taxpayer and commenced these proceedings for current and escape licenses.

It is not alleged that this action of the City was instigated by taxpayer's competitors, but it is a fair inference that such was the case. Otherwise, why would the City

amend its license schedule to "catch" one taxpayer? Unless pressure were applied, it is highly unlikely that the City would take such action for one non-resident taxpayer.

It is also a fair inference that the State Department of Revenue was aroused into action by these same competitors. Ordinarily, the State approaches an unlicensed concern with a simple request that the appropriate license be obtained. If it is obtained, ordinarily the State takes no further action except to see that the license is taken out in future years.

For non-residents, the State may invoke criminal penalties to insure presence of the taxpayer, as in **Graves v. State**, 258 Ala. 359, 62 So. 2d 446 (1953), but ordinarily the license sought is for the current year.

In the case at bar, the State suddenly discovered taxpayer, who had been running newspaper advertisements in most of the cities in the State for several years, and levied assessments to the limit of the law. The question is apparent: what stung the State into such drastic action? The most obvious explanation is political pressure.

This Court thought this was the explanation of the license on non-resident drummers in **Robbins v. Shelby County Taxing District**, 120 U. S. 489, 498, saying:

> "This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. "And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a State can, in this way, impose restrictions

upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it."

The purpose of these taxes to protect local business from out-of-state competition was recognized in **Best & Co. v. Maxwell**, 311 U. S. 454, but was spelled out in **Nippert v. Richmond**, 327 U. S. 416, 434:

"The tax here in question inherently involves too many probabilities, and we think actualities, for exclusion of or discrimination against interstate commerce, in favor of local competing business, to be sustained in any application substantially similar to the present one. Whether or not it was so intended, those are its necessary effects. Indeed, in view of that fact and others of common knowledge, we cannot be unmindful, as our predecessors were not when they struck down the drummer taxes, that these ordinances lend themselves peculiarly to creating those very consequences or that in fact this is often if not always the object of the local commercial influences which induce their adoption. Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against."

See also:

Lockhart, **Sales Tax in Interstate Commerce**, 52 H. L. R. 617, 621 (1939);

Lockhart, **State Tax Barrier to Interstate Trade**, 53 H. L. R. 1253, 1276 (1940);

Hartman, **State Taxation of Interstate Commerce**, 46 Va. L. R. 1051, 1095 (1960);

Developments in the Law—Federal Limitations on State Taxation of Interstate Business, 75 H. L. R. 953, 963 (1962).

Compare Isaacs, **Barrier Activities and the Courts,** in VIII Law and Contemporary Problems 382, 383 (1941), where the author observed:

> "Almost every extension of the licensing power of a state to a new industry is traceable to the wishes of men in that industry. Many of these have readily believed that they were working for higher standards of training, character and responsibility in their trade or profession. Actually, they were at the same time succeeding in keeping the 'outs' out, and thus limiting their own competition."

Of course, this relates to licensing under the police power, but it also indicates that local businesses have a tendency to create trade barriers to stifle competition even though they may believe their motives are pure. In the case at bar, the inference is irresistible that the motive in "sicking" the state on taxpayer was monopolistic and for the purpose of eliminating taxpayer as a competitor.

Since this admission license was suddenly developed as a result of a clear effort to exclude taxpayer from doing business in Alabama across State lines, and since these licenses lend themselves to such discrimination, this license should be stricken and this case should be reversed and rendered.

VIII.

CONCLUSION.

Since the Alabama Court fractionalized a single interstate transaction and sought to license an essential local element in the transaction, in violation of the Commerce

Clause, this case should be reversed and the assessment of this license should be invalidated. Furthermore, the legislature sought to impose a flat-sum privilege license on interstate activity. The effect of this is to exclude interstate activity and discriminate against it. This cannot withstand attack under the Commerce Clause. Therefore, this Court should reverse this case and hold for naught the assessment under this invalid statute. Since this license has been held by the Alabama Court to discriminate against interstate activity by requiring a weekly transient license for it, not required of intrastate activity, this Court should reverse this case and hold this construction of the photographer's license in Alabama, void, and set aside the assessment of the license on taxpayer.

Respectfully submitted,

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